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NO. 5-12-0272

APPELLATE COURT OF ILLINOIS

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) Appeal from the
) Circuit Court of
) Bond County.
)
) No. 11-SC-245
)
)
) Honorable
) Keith Jensen,
) Judge, presiding.

ORDER

¶ 4 On May 23, 2012, the circuit court held a bench trial on Hulvey's small claims complaint. At trial Sasse testified that in May 2010 he submitted written bids to Hulvey for

three separate construction projects to be completed at Hulvey's business. The first bid was for the construction of a 16 x 50-foot pole barn addition to Hulvey's existing warehouse which required the pouring of a concrete floor. Although this bid provided for the construction of a 78-foot retaining wall, it was later determined that in fact a 104-foot foundation wall was required which resulted in additional cost to Hulvey. The second bid was for the installation of interior tin liners for the existing 40 x 50-foot warehouse and the new 16 x 50-foot addition. This bid explicitly excluded the cost of installing insulation from the total price. The third bid was for the construction of a 14 x 56-foot lean-to on the outside of the building, later described as the loading dock. This bid included the cost to construct a 14 x 56-foot concrete pad. In early June 2010 Sasse began work.

¶ 5 It was agreed from the outset that Hulvey would install insulation in the interior walls inside the warehouse addition. Sasse testified that around August 23 he had completed as much work as he could on the warehouse addition and had to stop work to give Hulvey time to install the insulation and wiring. Sasse testified that when he left that day, he intended to come back to finish the remaining work.

¶ 6 Hulvey testified that after the insulation and wiring were installed he called Sasse several times to ask him to return to finish the work as agreed. Hulvey also testified that when he finally reached him, Sasse initially indicated that he would come out and complete the work. Hulvey further testified that after a few weeks had passed and Sasse had still not returned, Hulvey contacted him and was again told Sasse would come out in a few weeks. Hulvey testified that at some point Sasse stated that he would not return to finish the project because he decided it would be unprofitable for him to do so. Hulvey testified that when he informed Sasse that he would have to hire someone else to complete the work, Sasse did not object.

¶ 7 Sasse, on the other hand, testified that he originally planned to return to finish the

work. However, when he met with Hulvey to present a bill for the work completed up to that point, Sasse agreed to reduce his bill by \$2,400 to cover Hulvey's expenses in completing the work, and Hulvey stated that he would finish the job. When asked why he would agree to reduce the bill by \$2,400, Sasse testified that he "just wanted to get paid to be done with the job." The record reveals that Hulvey's wife, Ginger, was the secretary treasurer of the business and the one who actually paid the bills submitted by Sasse. Ginger testified that she heard Sasse's testimony about forgiving the \$2,400, but that it did not happen.

¶ 8 Between June 7 and July 26 Sasse laid concrete for the various projects. Hulvey contends the concrete work was bad. Although Hulvey testified that he had hands-on training in concrete work over the years, he stated on cross-examination that he was not a concrete expert. A photograph taken by Hulvey and admitted into evidence showed the condition of the concrete on the outside dock of the lean-to. Hulvey testified that when the concrete was being broom finished, the top layer of concrete was pulled off, leaving "a raw exposure of the rocks" and he noted it was "very rough." Another photograph, also taken by Hulvey and admitted into evidence, showed where the concrete of the existing warehouse and the concrete of the new addition poured by Sasse met. Hulvey testified that the concrete had a lip that needed to be ground down because the two floors were uneven. When asked if he had ever given Sasse a chance to fix the concrete, Hulvey responded, "He never come [*sic*] back to finish it for me to tell him on that part."

¶ 9 Sasse, who had been in the construction business for 25 years and had experience in concrete work, testified on direct examination that he believed the concrete work was satisfactory. Sasse also testified that Hulvey never stated that he was not satisfied with the concrete. On cross-examination, when asked whether the lip on the concrete floor was reasonable craftsmanship, Sasse testified that at the time he poured the concrete Hulvey did not know where he wanted the door to be hung. Sasse stated, "So to have pinpoint accuracy

to know exactly where the concrete level would have been at that point, yes, it would have been hard to do." Sasse offered into evidence a print out of Hulvey's payment history which included a bill to Hulvey requesting \$9,311.25 "due on partial concrete work."

¶ 10 Hulvey testified that in addition to buying the materials to complete the interior work, he had to hire two individuals. In July 2011 Hulvey sent an invoice to Sasse in the amount of \$2,850 for the labor and materials, which remained unpaid at the time of trial. Attached to the invoice were receipts for costs incurred by Hulvey. In addition, Hulvey testified that there were extra expenses for the concrete work that remained unfinished. After having his memory refreshed, Hulvey testified as to what it would cost him to finish the concrete work, including grinding down the lip between the old and new concrete floors, the cost of concrete for the dock of the lean-to, the cost of an additional 20 inches of concrete on the footing, and some labor costs associated with this work. Although Hulvey failed to provide a total amount for the unfinished concrete work, he testified that between the unfinished interior work and the unfinished concrete work, he was out \$5,200.40 due to Sasse's nonperformance.

¶ 11 Sasse points out that while Hulvey's correspondence demanded \$2,850 for the interior work, there was no mention of the concrete work. He further notes that Hulvey, who testified he was not a concrete expert, was the only witness to testify in the small claims hearing to the damages associated with the concrete work. Hulvey testified that he did not submit bills for the unfinished concrete work since he planned to complete the job himself.

¶ 12 Hulvey testified that he intended to hold back \$5,000 in payment to Sasse until completion of the job; however, he ended up holding back \$2,000 instead. Ginger testified as to her understanding of the payment agreement for the job. She stated that she was to pay Sasse 25% of the total cost prior to work beginning, 50% during the course of the work, and the remaining 25% upon completion of the work. She further testified that due to the way Sasse requested and received payment throughout the course of the projects, the full 25% did

not get withheld at the end. On cross-examination Hulvey agreed that the \$2,000 should be deducted from his claim for damages. On redirect examination, however, Hulvey reasserted his original claim for damages in the amount of \$5,200.40.

¶ 13 In summarizing the evidence presented at trial, the court, in pertinent part, stated as follows:

"The problem is I've got two distinctly different situations. According to [Hulvey], [Sasse] didn't complete the job. You were unhappy he didn't complete the job. It's kind of unusual that you wouldn't say to him, oh, the concrete wasn't done right, or make specific complaints, but you simply indicate that he would not come back and finish the job. [Sasse's] story is that he went in; he was doing the job. He reached a point where [Hulvey] thought [Hulvey was] going to finish it up. You talk money; you kind of work things out, sort of, [Sasse] thinks. But then we have no longer a meeting of the minds."

¶ 14 In finding in favor of Hulvey, the circuit court stated on the record that "the evidence slightly favors [Hulvey] in this case," and, noting that Hulvey had retained a \$2,000 "holding fee," reduced the award of damages to \$3,200.

¶ 15 ANALYSIS

¶ 16 At the outset we note that Hulvey elected to stand on the record and did not file an appellee's brief. Because we find the record in this case is simple and the claimed errors can be easily decided without the aid of the appellee's brief, we turn to the merits on appeal. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 17 On appeal Sasse contends that the circuit court erred in finding Sasse liable to Hulvey for a breach of contract and in setting the amount of damages it awarded to Hulvey for that breach. We examine these claims in turn.

¶ 18 "The standard of review in a bench trial is whether the judgment is against the

manifest weight of the evidence." (Internal quotation marks omitted.) *Kunkel v. P.K. Dependable Construction, LLC*, 387 Ill. App. 3d 1153, 1157 (2009). "A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." (Internal quotation marks omitted.) *Id.* "When contradictory testimony that could support conflicting conclusions is given at a bench trial, an appellate court will not disturb the trial court's factual findings based on the testimony unless a contrary finding is clearly apparent." (Internal quotation marks omitted.) *Id.*

¶ 19 There is no dispute that the work was not finished when Sasse left on August 23. The issue was whether this unfinished work amounted to a breach of contract, and the circuit court was faced with contradictory testimony on this issue. The circuit court highlighted this in referencing the "two distinctly different situations" presented by the parties.

¶ 20 At trial Hulvey's claim of breach centered on Sasse's failure to return to complete the work after Hulvey had installed the insulation and wiring. Sasse agreed that he did not finish the job, but testified, in effect, that he did not breach the contract because Hulvey decided to finish the job himself. Sasse's testimony indicated that he believed there was a new agreement wherein he would reduce his final bill by \$2,400, and Hulvey would finish the work himself.

¶ 21 Sasse focused his trial testimony on the quality of the concrete work. Although there was testimony as to the quality of the concrete work, Hulvey's claim for breach of contract centered on Sasse's failure to return and complete the work. In support of that claim Hulvey presented photographs of the condition of the concrete work at the time of trial and testified as to what it would cost him to complete the concrete work in light of Sasse's failure to return. At trial Sasse did not refute Hulvey's testimony that there was a lip between the old and new concrete floors that had to be ground down to make the floors even. In fact, Sasse,

in explaining why the lip in the concrete was there, testified that he could not have known "exactly where the concrete level would have been" since Hulvey had not yet decided where to place the door. Furthermore, Sasse himself acknowledged there was concrete work that remained unfinished when he submitted a bill to Hulvey requesting \$9,311.25 "due on partial concrete work."

¶ 22 The circuit court, faced with conflicting testimony, determined that "the evidence slightly favors [Hulvey] in this case," and we cannot say that a contrary finding is clearly apparent. Accordingly, we find there is sufficient evidence in the record to support the circuit court's finding in favor of Hulvey on the issue of breach. We turn to the issue of damages.

¶ 23 On appeal Sasse maintains that the circuit court's award of damages is against the manifest weight of the evidence. We disagree. "The rule that a trial court's findings in a bench trial will not be disturbed unless manifestly erroneous applies equally to a trial court's assessment of damages." *Sharon Leasing, Inc. v. Phil Terese Transportation, Ltd.*, 299 Ill. App. 3d 348, 356 (1998). "As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." (Internal quotation marks omitted.) *Kunkel*, 387 Ill. App. 3d at 1158.

¶ 24 Sasse first argues that Hulvey failed to prove the costs associated with the concrete work. Sasse attacks Hulvey's evidence on this point by asserting that Hulvey never complained about the concrete before filing suit and that Hulvey did not present expert testimony about the concrete. However, these assertions only go to the weight of the evidence, and the trial court is the judge of the credibility of witnesses and the weight to give their testimony. *Id.*

¶ 25 Sasse next argues that Hulvey's numbers simply "don't add up." Hulvey presented evidence that he sustained damages as a result of the breach in that he was required to spend

additional money to complete the work. The amount of damages associated with the interior work is clear and documented by invoices. The cost of repairing the concrete work is based primarily on Hulvey's oral testimony. Sasse, who testified that he had been in the construction business for 25 years and had experience in concrete work, heard Hulvey's testimony and yet did not refute Hulvey's claims or introduce evidence challenging the amount to finish the work. Sasse had ample opportunity to cross-examine Hulvey concerning his claimed damages for the unfinished concrete work, but neglected to do so. After refreshing his recollection Hulvey testified that the total damages were \$5,200.40, and the trial court was free to accept his testimony.

¶ 26 The decision in this case is guided by our standard of review. The trial court is in a better position to judge the credibility of the witnesses and decide the weight to give the evidence. The circuit court was faced with conflicting testimony and determined that Hulvey proved the amount of damages claimed, less the \$2,000 withheld. An opposite conclusion is not clearly apparent. We therefore find that Hulvey's testimony provided a sufficient basis for the court's award of damages in this small claims matter.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Bond County is affirmed.

¶ 29 Affirmed.